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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060342
Party	Defendant Celebrus, LLC dba ARIIX
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Healthy Directions, LLC,  Petitioner  v.  Celebrus, LLC dba ARIIX  Registrant.	Cancellation No. 92060342     Registration No. 4570100 OMEGA-Q
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**BRIEF IN OPPOSITION TO PETITIONER’S MOTION FOR SUMMARY  
JUDGMENT**

Registrant, Celebrus, LLC dba ARIIX (“Registrant”) hereby submits this Brief in opposition to the motion of Petitioner, Healthy Directions, LLC (“Petitioner”) for summary judgment.

**I. INTRODUCTION**

Petitioner is not entitled to summary judgment. As shown below, there are issues of material fact that should be decided by the Board during trial. The facts and the law do not support granting Petitioner’s motion for summary judgment, because there is no likelihood of confusion between Registrant’s mark and Petitioner’s mark.

**II. STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is only appropriate where there are no genuine issues of material fact in dispute, which leaves the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). The Board does not resolve issues of fact on summary judgment; it only determines

whether a genuine issue exists. *Meyers v. Brooks Shoe, Inc.*, 912 F.2d 1459, 1461, 16 U.S.P.Q.2d 1055, 1056 (Fed. Cir. 1990), *overruled on other grounds by A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1038-39, 22 U.S.P.Q.2d 1321, 1333 (Fed. Cir. 1992).

Petitioner, as the movant, has the burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-37 (1986). To prevail on its motion, Petitioner must establish that there is no genuine issue of fact regarding the issues at hand by clear and convincing evidence. *See H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986).

In order to have the opportunity to submit proofs at trial, Registrant need only show that, on the evidence of record, a reasonable fact finder could resolve the matter in its favor. *See Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 850, 23 U.S.P.Q.2d 1471, 1472-73 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 202, 22 U.S.P.Q.2d 1542, 1544 (Fed. Cir. 1992); *see also Vista Int'l Serv. Ass'n v. Life-Code Sys., Inc.*, 220 U.S.P.Q. 740, 742 (T.T.A.B. 1983)(on summary judgment motion, “nonmoving party is not required to adduce evidence sufficient to prove its case . . .”; it need only show “that there is a genuine issue as to a material fact and that, therefore, there is a need for a trial”). The evidence should be viewed in a light most favorable to Registrant as the nonmovant, and all justified inferences should be drawn in Registrant’s favor. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 767, 25 U.S.P.Q.2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 970 F.2d at 850, 23 U.S.P.Q.2d at 1472.

### III. PETITIONER IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIKELIHOOD OF CONFUSION.

The Federal Circuit has stated that the ultimate question of the likelihood of confusion between two marks is a question of fact. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). Or if labeled a mixed question of law and fact—or even if labeled a question just of law—such question is still answered by examination of the facts in evidence. *Id.* The court in that case stated that “[t]here is no litmus rule which can provide a ready guide to all cases.” *Id.*

In order to assist with that examination, the court in *DuPont* listed the principal considerations relevant to the issue of a likelihood of confusion. *Id.* See also *Opryland*, 970 F.2d at 850. Not all of the listed factors are relevant in each case. See *DuPont*, 476 F.2d at 1361; see also *Opryland*, 970 F.2d at 850. In addition to factors mentioned by Petitioner in its brief, other relevant factors with respect to the marks here at issue include the following: “(3) The similarity or dissimilarity of established, likely-to-continue trade channels”; “(4) The conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing”; “(6) The number and nature of similar marks in use on similar goods”; “(7) The nature and extent of any actual confusion”; “(13) Any other established fact probative of the effect of use.” *DuPont*, 476 F.2d at 1361. To these considerations, other courts have added strength of the mark in their likelihood-of-confusion factors. See *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619 (6th Cir. 2002); *Sullivan v. CBS Corp.*, 385 F.3d 772 (7th Cir. 2004); *M2 Software, Inc. v. Madacy*

*Entertainment*, 421 F.3d 1073 (9th Cir. 2005); *Team Tires Plus, Ltd. v. Tires Plus, Inc.*, 394 F.3d 831 (10th Cir. 2005).

**A. Petitioner's mark and Registrant's mark are weak marks, and therefore, unlikely to be confused by consumers.**

When a mark is weak, the consuming public is not likely to be confused by a similar mark. *General Mills, Inc. v. Kellogg Company*, 824 F.2d 622, 626 (8th Cir. 1987). The beginning of the analysis is to assess a mark's strength by categorizing the mark in its place on the following scale of distinctiveness: generic, descriptive, suggestive, and fanciful or arbitrary. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 631 (6th Cir. 2002); *General Mills*, 824 F.2d at 625. A mark is designated as generic if consumers consider the mark to merely describe a type, genus, or class of goods, and such marks are not protectable as trademarks. *General Mills*, 824 F.2d at 625. A descriptive mark designates characteristics, qualities, effects, or other features of a product that can be protected only if shown to have become distinctive through acquiring secondary meaning. *Id.*

Without such trademark protection for generic and descriptive marks, courts will not find likelihood of confusion between two similar marks that are similarly weak. For example, the Eighth Circuit upheld a district court finding that the plaintiff's mark "APPLE RAISIN CRISP" for breakfast cereal was a weak mark and failed to grant a preliminary injunction against its use sought by the owner of "OATMEAL RAISIN CRISP" for breakfast cereal. *Id.* The court in *Hearthware, Inc. v. E. Mishan & Sons, Inc.* did not find a likelihood of confusion between the marks "NU WAVE" and "SUPER WAVE," both of which covered halogen ovens, because the common element "wave" was descriptive, and therefore, weak.



*Hearthware, Inc. v. E. Mishan & Sons, Inc.*, 104 U.S.P.Q. 1207 (N.D. Ill. 2012). Further, the Board did not find likelihood of confusion between “DIGIRAY” for electronic X-ray systems and “DIGIRAD” for radiation sensors because “DIGI” is descriptive for digital equipment and careful buyers will be aware of the slight differences in the marks. *In re Digirad Corp.*, 45 U.S.P.Q.2d 1841 (T.T.A.B. 1998).

Frankly, both Petitioner’s and Registrant’s marks are weak, descriptive marks, and therefore not prone to a likelihood of confusion among a consuming public that is well-attuned to differences in weak, descriptive marks. OMEGA identifies omega fatty acids, which Petitioner’s and Registrant’s goods contain, and which is a commonly used mark in the nutritional supplement industry to designate goods containing omega fatty acids. Q identifies vitamin Q, which is also known as Coenzyme Q10, and which is contained in the parties’ goods. Q is also a mark commonly used in the nutritional supplement industry to indicate that a product contains Coenzyme Q10. Petitioner’s mark adds PLUS to its mark, but PLUS is not distinctive and does not readily identify the source of Petitioner’s goods. The attached declaration of Registrant’s Chief Financial Officer, Jeffrey Yates, includes numerous examples of nutritional supplements using various configurations of “omega”, “q”, and “plus.” The marks, in short, are descriptive, and therefore, weak.

“Determining that a mark is weak means that consumer confusion has been found unlikely because the mark’s components are so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related.” *General Mills*, 824 F.2d at 626.

A weak, descriptive mark must have secondary meaning, or acquired distinctiveness in the eyes of consumers, in order to be a valid, protectable mark. *Estee Lauder, Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1509 (2nd Cir. 1997). The following factors are generally considered when determining whether a proposed mark has acquired distinctiveness based on extrinsic evidence: (1) length and exclusivity of use of the mark in the United States by applicant; (2) the type, expense, and amount of advertising of the mark in the United States; and (3) applicant's efforts in the United States to associate the mark with the source of the goods and/or services, such as unsolicited media coverage and consumer studies. *See In re Steelbuilding.com*, 415 F.3d 1293, 1300, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *Bd. of Trs. v. Pitts, Jr.*, 107 USPQ2d 2001, 2016 (TTAB 2013). There is currently no evidence before the Board concerning secondary meaning acquired by Petitioner's mark. Petitioner, therefore, cannot be granted summary judgment in its favor.

**B. Established trade channels and buyers who make careful, sophisticated purchases preclude any likelihood of confusion.**

"[A] determination that there is no likelihood of confusion may be appropriate, even where the marks are similar and the goods/services are related, because these factors are outweighed by other factors, such as differences in the relevant trade channels of the goods/services . . . ." TMEP § 1207.01, citations omitted and emphasis added.

"[C]ircumstances suggesting care in purchasing may tend to minimize the likelihood of confusion." TMEP § 1207.01(d)(vii), citations omitted.

Registrant's goods bearing the OMEGA-Q mark are marketed by direct solicitation through Registrant's independent distributors and network marketing sales agents (e.g.,

Registrant's dedicated, direct-to-the-public sales force). It is, therefore, impossible for consumers to encounter Registrant's goods in the same commercial setting as those goods covered by Petitioner's mark. The normal channels of trade for Petitioner's goods is not—and never will be—Registrant's direct sales force. Further, the consumers of OMEGA-Q know that it is only sold through direct solicitation and they actively seek out Registrant's sales agents to purchase OMEGA-Q. Consumers understand that the only source for OMEGA-Q is through Registrant's sales agents. Consumers must make careful, sophisticated, and deliberate choices in order to purchase OMEGA-Q.

**C. The only evidence before the Board states that there is no actual confusion between the marks.**

Since July 4, 2011, both Petitioner's mark and Registrant's mark have coexisted without actual confusion among consumers. Petitioner has not provided any evidence that there has been any actual confusion between the marks. To the contrary, the only evidence before the Board regarding actual confusion is the declaration of Registrant's Chief Financial Officer, Jeffrey Yates, that there are no known instances of actual confusion of the marks in question.

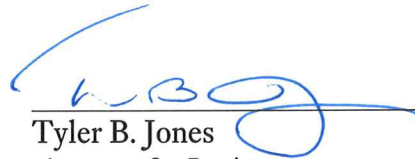
**IV. CONCLUSION**

For all of the foregoing reasons, the Board should deny Petitioner's motion for summary judgment.



Dated: May 6, 2015

Celebrus, LLC dba ARIIX



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## CERTIFICATE OF SERVICE

I certify that on May 6, 2015, I served a true and correct copy of the foregoing BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT by first-class mail to Petitioner's counsel at the following address:

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